in mind the circumstances in which he was required to perform that identification.

On the 28th of December when he is alleged to have seen the accused it was getting dusk, the identification was in poor light at best. The accused was some 160 feet away from him and was travelling on a bicycle, and according to the witness, Simon Liew, he could see the side of the face and head and forehead. Those are not circumstances most ideally suitable for clear and definite identification, and we feel that the fact that he was summoned to the police station may be indicative of some doubt in his own ability to identify the person whom he saw on the 28th. He has all along been sure that the accused was the person he saw on the 22nd, but on that day he was much nearer to the person whom he identified and had a much better opportunity of identifying. I do not think that the witness has been deliberately lying. He appeared to the learned judge to be an honest witness, and we have no reason to doubt that this is so, but there is the danger that he was uncertain as to his ability to identify and the fact that he was given the opportunity of seeing the witness at the police station may be some support for this, but more seriously it would tend to condition his mind to the belief that the person whom he was looking at was the person whom he had seen on the 28th of December. Having been invited to the police station to identify someone, even though he was not told what person he was to identify, the moment he saw the relatives of the deceased sitting there, he would clearly come to the conclusion that the person who had been arrested had been arrested in connection with the murder of the deceased.

We therefore feel that the conviction cannot stand, and the conviction must be set aside and the accused must be discharged.

What the police may choose to do with the accused in view of his illegal status in Sarawak is a matter entirely for them.

The court also directs that a copy of the evidence of Mr. Simon Liew should be sent to the commissioner of police so that suitable action may be taken against the police officer responsible for the scandalous behaviour in taking a witness to the police station so that he could identify an accused person before an identification parade was held.

Conviction set aside.

NG SHIN HON v. CHOW WAI CHUANG

[O.C.J. (Chua J.) September 12, 1967]

[Singapore — Suit No. 1606 of 1966]

Tort — Negligence — Concealed danger — Whether a trap — Engineer injured while inspecting works carried out by contractor — Contractor's duty to take reasonable care.

Damages — Pubic bone — Fracture of inferior ramus of left pubic bone — Muscle weakness — Aggravation of pre-existing osteo-arthritis of spine and hips.

The defendant was a contractor carrying out certain works on the land forming part of Monk's Hill School under a contract with the Government of Singapore. The plaintiff was an engineer of the P.W.D. who was responsible for the inspection of the execution of the defendant's contract. While inspecting the site one morning the plaintiff came across some thin metal sheets lying on the ground. He walked on the metal sheets thinking them to be lying on firm ground. However the metal sheets had been used to cover a trench which the defendant had dug (without the instructions of the plaintiff) and as a result the plaintiff suffered a fracture of the inferior ramus of the left pubic bone. In an action for damages:

Held: (1) the contractor was under a general duty to take reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work whether as invitees or licensees or other contractors. In this case the defendant did not fence the trench but instead covered it with thin metal sheets and created a concealed danger unfenced and without warning. The defendant had no right to set a trap for the plaintiff whom he knew would come on the land. The defendant was therefore negligent;

(2) the plaintiff was not negligent in walking over the metal sheets because he had no reason to believe that there might be danger in walking on them;

(3) although the plaintiff had recovered from his injury there was residual functional impairment in the form of muscle weakness and an aggravation of pre-existing osteo-arthritis of the spine and hips and a superimposed rheumatic affection of the sciatic nerve. Taking all the circumstances into consideration the plaintiff should be awarded $5,000 general damages.

Cases referred to:—

(1) *Clayard* v. *Dethick* 116 E.R. 932.

(2) *Corby* v. *Hill* 140 E.R. 1209.

(3) *Kimber* v. *Gas Light & Coke Co.* [1918] 1 K.B. 439.

CIVIL SUIT.

Denis Murphy for the plaintiff.

K. C. Chan for the defendant.

Cur. Adv. Vult.

Chua J.: The plaintiff's claim against the defendant is for damages for personal injuries, loss and damage suffered by the plaintiff and caused by the negligence of the defendant, his servants or agents.

The plaintiff's evidence is shortly as follows. On and before the 1st March, 1966, the defendant was carrying out under a contract with the Government of Singapore certain works on the land forming the curtilege of Monk's Hill School in connection with an extension of the school by adding an additional floor to the building and constructing a staircase leading up to it. The plaintiff was at all material times an engineer of the Public Works Department and it was part of his duties as such engineer to inspect from time to time the execution of the defendant's contract. Piles were driven at two sites, at one

end of the school building, to take the new staircase but the piles could not be sunk very low as they hit rock. It was then decided to replace the piles with raft foundations, one raft at each site. The piles had to be extracted and the sites excavated first to a depth of 6 ft. to 7 ft. and the final depth would be decided later. (I will hereafter refer to the two sites as raft No. 1 and raft No. 2.) It was also decided to put in the rafts one at a time. On the 26th February, 1966, the plaintiff gave the defendant instruction to dig a trench at raft No. 2 to a depth beyond the rocks to firm ground and the plaintiff would come later and inspect and confirm that the depth was sufficient. The defendant was specifically told not to start excavating at raft No. 1 until the plaintiff gave the instruction to do so. The plaintiff also told the defendant the same day to put a small earth bund around the trench and put up a shed, with zinc roof resting on struts, well above the trench to keep rain water from getting into it. The next day, the 27th February, the plaintiff visited the site expressly to see the excavation at raft No. 2. The plaintiff found that a trench had already been dug to a depth of two or three feet at raft No. 2 but the zinc roof was not up and the earth bund around the trench was not there. No work had been done at raft No. 1, it had not been touched. The plaintiff went to the site the next morning, the 28th February. He found that the excavation at raft No. 2 was well in progress nearing completion; no excavation had been done at raft No. 1. He left the site at 9.30 a.m. The following day, the 1st March, the plaintiff went to the site at 8.30 a.m. to inspect the excavation at raft No. 2 and also to inspect the back of the school building to see the progress there. He walked with the P.W.D. overseer towards the excavation site and was talking to the overseer. Coming to the position where raft No. 1 was he saw some thin metal sheets lying flat on the ground as if they were on solid ground. He walked on the metal sheets and suddenly he fell into a trench seven to eight feet deep. The metal sheets had in fact covered the trench. He did not think that these metal sheets covered a trench as on the previous day the trench had not been there and he had not given the instruction to excavate at raft No. 1. As a result of the accident he suffered personal injuries.

The defendant's evidence is shortly this. He commenced piling two piles at raft No. 1 and two piles at raft No. 2 at the end of January, 1966. When the piles hit rock piling work stopped. On or about the 24th February, 1966, the plaintiff instructed him to pull out the four piles and dig two holes at raft No. 1 and two holes at raft No. 2 where the piles were. While the holes were being dug the earth around the holes kept on falling into the holes and he was instructed by the plaintiff to dig a trench twelve and a half feet long, five feet wide and six to seven feet deep at raft No. 1 instead of the two holes and to dig a similar trench at raft No. 2. He began to pull out the piles on the afternoon of the 24th February and all of them were removed that same afternoon. The next day, the 25th February, excavation work at raft No. 1 and raft No. 2 commenced. On the 26th February, the plaintiff instructed him to put up a shed over the two trenches and to put an earth bund around them and that was done on the afternoon of the same day. On the 27th February, he saw that the trenches were slightly wet and he instructed his workmen to cover up the trenches at the end of each day to keep off rain water by placing rafters, resting on the earth bund, across the trenches and placing thin zinc sheets on the top of the rafters. Excavation work at raft No. 1 and at raft No. 2 was completed on the afternoon of the 28th February and the thin zinc sheets were placed over the trenches at the end of the day.

The plaintiff's case is that the defendant knew or ought to have known that the trench at raft No. 1, concealed as it was with sheets of metal incapable of bearing the weight of a person who might walk upon them, constituted a danger to persons coming upon the land in ignorance of the existence of the trench and that the accident to the plaintiff was caused by the negligence of the defendant, his servants or agents.

The defence is that the plaintiff knew of the trench at raft No. 1 and that he accidentally or negligently walked on the metal sheets. Alternatively the defendant says the plaintiff by walking on the metal sheets "voluntarily assumed the risk of injury."

Counsel for the defendant submits that this case should be decided on the basis that the defendant was the occupier of the land and the plaintiff an invitee and that the duty of an occupier to his invitee is limited to dangers which are unusual, of which he knows or ought to know. With all due respect to counsel I do not agree with his submission.

We are not in this case concerned with the liability of an occupier of land but with the liability of a contractor who was doing work on the land.

There are many authorities which show that the contractor's duty is not confined to his duty under the contract to his employer. He is under a general duty to use reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work. In *Clayard* v. *Dethick*,[1] a contractor in order to make a sewer dug a trench in a private passage leading to a mews. He negligently failed to fence the opening. Whilst a cabman was leading out his horse it fell into the trench and was killed. The contractor was held liable for negligence. In *Corby* v. *Hill*,[2] the owner of land having a private

road for the use of persons coming to his house gave permission to a building contractor, who was engaged in building on the land, to place materials on the road. The contractor placed a pile of slates on the road and left them unlighted at night. A visitor ran into them in the dark. The contractor was held liable for negligence. In *Kimber* v. *Gas Light & Coke Co.*,(3) the gas company when putting gas into a private house made a hole in the floor and failed to warn a visitor of the danger. They were held liable for the injury which resulted. There are many other cases. The cases show that the duty of care is owed to all those whom the contractor may reasonably expect to be affected by his work, whatever the capacity in which they come, whether as invitees or licencees or as other contractors.

The main question of fact to be decided in this case is whether or not the plaintiff knew of the existence of the trench at raft No. 1.

I have considered the evidence adduced by both sides very carefully. On the balance of probabilities I think the story of the plaintiff is the true story. I find that the defendant was specifically told not to commence excavating at raft No. 1 until the excavation at raft No. 2 was completed and approved by the plaintiff. I also find that the plaintiff was not aware of the trench at raft No. 1 when he visited the site on the morning of the 1st March.

The defendant after making the trench at raft No. I did not fence it. Instead of that he covered the trench with thin metal sheets and created a concealed danger unfenced and without warning. The defendant had no right to set a trap for the plaintiff whom he knew would come on the land. In my view the defendant has been negligent.

It is said that the plaintiff was negligent in walking over the metal sheets when he ought not to. How can one say that the plaintiff was negligent when he had no reason to believe that there might be danger in walking over the metal sheets?

For these reasons the plaintiff succeeds in his claim.

As a result of the accident the plaintiff sustained a fracture of the inferior ramus of the left pubic bone. He has recovered from his injury but there is residual functional impairment in the form of muscle weakness and an aggravation of pre-existing osteo-arthritis of the spine and hips and a superimposed rheumatic affection of the sciatic nerve. Taking all the circumstances into consideration I think the proper figure to award the plaintiff by way of general damages is $5,000.

Special damages has been agreed at $306.

There will be judgment for the plaintiff in the sum of $5,306 and costs.

Judgment for the plaintiff.

Solicitors: *Murphy & Dunbar; Braddell Bros.*

TOEH KEE KEONG v. TAMBUN MINING CO. LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) September 18, 1967]

[Ipoh — Federal Court Civil Appeal No. X. 27 of 1965]

Contract — Mining contract — Breach of — Measure of damages — Loss of business profits — Novation — Contracts (Malay States) Ordinance, 1950, ss. 63 and 74 — Evidence Ordinance, 1950, s. 92 — Best evidence.

By a series of permits and sub-leases granted by one Leong Kee Nyean who was a director of certain private companies one of which held a mining certificate the appellant came to have eventually a contractual agreement transferred from Ipoh Mining to the respondents with whom now his mining operations were to continue. This was to work a certain mining land on a cliff, which required arduous work and costly preliminary outlay before the ore could be won and earn the stipulated remuneration per ton on delivery.

After the said mining operations had progressed and begun to yield ore, so that deliveries were able to flow for some months by work of the appellant, the respondent company gave notice of halting the operations and terminating the agreement under the contract. The appellant claimed $290,000.45 which he itemised, being the value of the work done, outlay and materials used and labour and expenses.

The trial judge held that there had been a breach of contract and found the respondents' share as 10½/24¾ of the total expenditure, and gave judgment for the respondent in the sum of $99,272 and costs. On being dissatisfied with the assessment of damages, the plaintiff appealed to the Federal Court. The only issue in the appeal was whether the judgment was right as to the principle applied in the assessment of damages.

Held: (1) in considering the question of damages the yardstick could either be loss of profits or, in the alternative, compensation for capital loss and expenses rendered futile by the breach;

(2) the method of assessment adopted by the learned trial judge could not be justified either in logic or principle. It was clearly in the contemplation of the contracting parties that the appellant should not be denied the fullest opportunity to recoup all the moneys he had sunk into the enterprise. Such being the case there was no need for apportionment. There had been a novation, to which section 63 of the Contracts (Malay States) Ordinance applied;

(3) on the claim, order of the court below set aside and (a) judgment entered for $121,220 with interest thereon at 5% per annum from February 7, 1963 and (b) that an enquiry be held by the registrar as to the actual loss suffered by the appellant on item 8, and judgment for the further sum so found, with interest likewise at 5% per annum from February 7, 1963.

Cases referred to:—

(1) *Hadley* v. *Baxendale* (1854), 9 Exch. 341.

(2) *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528, 539.